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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Fund for Empowerment, *et al.*,

Plaintiffs,

v.

City of Phoenix, *et al.*,

Defendants.

Case No: 2:22-cv-02041-PHX-GMS

**DEFENDANTS' MOTION TO DISSOLVE
PRELIMINARY INJUNCTION ORDER**

Defendants City of Phoenix, Rachel Milne, and Michael Sullivan, as well as formerly named Defendant Jeri Williams (collectively, the "City"), move to dissolve the Court's Order entering preliminary injunction in this matter. In December 2022, after an evidentiary hearing, the Court issued an Order granting in part and denying in part Plaintiffs' request for a preliminary injunction. Doc. 34 (the "Order"). The Order enjoined the City from: (1) enforcing its camping and sleeping bans against individuals who practically cannot obtain shelter as long as there are more unsheltered individuals in

1 the City than there are shelter beds available;¹ (2) seizing property of the unsheltered
2 without providing prior notice at the property's location that the property will be seized
3 absent an objectively reasonable belief that the property is abandoned, an immediate
4 threat to public health or safety, or evidence of a crime or contraband; and (3) destroying
5 seized property without maintaining it in a secure location for no less than 30 days,
6 absent an immediate threat to public health and safety. *See id.* at 19.

7 Much has changed since the December 2022 evidentiary hearing and subsequent
8 issuance of the Order. First, there has been a significant change in the law. On June 28,
9 2024, the U.S. Supreme Court ruled that the enforcement of generally applicable laws
10 regulating camping on public property does not constitute "cruel and unusual
11 punishment" prohibited by the Eighth Amendment, overturning contrary Ninth Circuit
12 authority. *See City of Grants Pass v. Johnson*, No. 23-175, 144 S. Ct. 2202 (2024).
13 Second, the facts underlying the Order have changed significantly. Specifically, the
14 downtown area that Plaintiffs refer to as "the Zone" has been dismantled, eliminating the
15 routine, large-scale cleanups and disposition of property with which Plaintiffs were
16 primarily concerned. Moreover, since the hearing, the Court has received evidence that
17 the City has adopted consistent, citywide policies for the treatment of property both
18 within and outside of "the Zone," the lack of which drove the Court's entry of the Order
19 in significant part.

20 These significant changes in law and fact warrant dissolving the Court's Order.
21 After the Supreme Court's decision, there is no longer a legal basis to prohibit the City
22 from enforcing its camping and sleeping bans against unsheltered persons, regardless of
23 their voluntary or involuntary homeless status. Moreover, given the change in facts, there
24 is no need for a continuing "obey the law" sort of order of injunction, as any viable

25 ¹ Upon the City's motion, in October 2023, the Court modified Provision 1 of the Order
26 to enjoin the City from "[e]nforcing the Camping and Sleeping Bans against involuntarily
27 homeless persons for sleeping in public if there are no other public areas or appropriate
28 shelters where those individuals can sleep." Doc. 119 at 3.

1 claims for seizure or destruction of property (which the City disputes) can be handled in
2 the ordinary course of litigation. The Court should dissolve the Order.

3 ARGUMENT

4 A party seeking dissolution of an injunction bears the burden of establishing: (1)
5 that there has been a significant change in facts or law and (2) that the change warrants
6 revision or dissolution of the injunction. *Karnoski v. Trump*, 926 F.3d 1180, 1198 (9th
7 Cir. 2019) (citing *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000)). The latter
8 inquiry “should be guided by the same criteria that govern the issuance of a preliminary
9 injunction”—*i.e.*, a likelihood of success on the merits; a likelihood of irreparable harm; a
10 favorable balance of equities; and consideration of the public interest. *Id.*

11 **I. The U.S. Supreme Court’s Decision in *City of Grants Pass v. Johnson* is a** 12 **Significant Change in Law that Warrants Dissolving the Injunction as to** 13 **the Prohibition on Enforcement.**

14 At the time the Court issued and later amended the Order, controlling Ninth
15 Circuit precedent was that the Eighth Amendment prohibits the imposition of criminal
16 and civil penalties for sitting, sleeping, or lying outside on public property for homeless
17 individuals who cannot reasonably obtain shelter. *See Martin v. City of Boise*, 920 F.3d
18 584, 616-617 (9th Cir. 2019); *Johnson v. City of Grants Pass*, 72 F.4th 868, 896 (9th Cir.
19 2023). But this is no longer the law. On June 28, 2024, the U.S. Supreme Court held that
20 the enforcement of generally applicable laws regulating camping on public property does
21 not constitute cruel and unusual punishment under the Eighth Amendment, concluding
22 that homelessness policy should be vested in the American people’s elected
23 representatives, and overruling *Martin* and *Johnson*. *See City of Grants Pass v. Johnson*,
24 No. 23-175, 144 S. Ct. 2202, 2220-23 (2024).

25 A Supreme Court decision that undoes the precedent upon which an injunction is
26 based is a significant change in the law. Indeed, at the March 29, 2024 hearing on the
27 Intervenor Defendants’ motion to dismiss, Plaintiffs’ counsel conceded that a change in
28 Ninth Circuit precedent would “fundamentally change[]” the basis for Plaintiffs’ Eighth

1 Amendment claims, if not make their claims “subject to dismissal.” *See* Exhibit 1,
 2 03/29/24 Tr. at 19:4-12. The Court put it more plainly, suggesting Plaintiffs’ claims
 3 “might evaporate” with such a change in the law. *Id.* at 19:13. And as anticipated, in the
 4 wake of the Supreme Court’s decision, Plaintiffs have abandoned their claim for relief
 5 under the Eighth Amendment’s cruel and unusual punishment clause. *See* Doc. 159-1 at
 6 pp. 40-42.²

7 Stated simply, after the Supreme Court’s decision in *Grants Pass*, Plaintiffs no
 8 longer have a viable Eighth Amendment claim, making success on the merits impossible
 9 as a matter of law. This change in the law thus warrants dissolving the Order as to
 10 Provision 1.

11 **II. Significantly Changed Facts Warrant Dissolving the Injunction as to the**
 12 **Remaining Provisions of the Order Regarding Treatment, Storage, and**
 13 **Disposition of Personal Property.**

14 As to Provisions 2 and 3 of the Order, the facts have changed significantly since
 15 the December 2022 hearing. At that hearing, Plaintiffs stated they were concerned about
 16 treatment, storage, and disposition of unsheltered persons’ personal property in two
 17 locations: first, within the area Plaintiffs call “the Zone,” where Plaintiffs were concerned
 18 about personal property during enhanced cleanups; and second, throughout the rest of the
 19 City. *See* Exhibit 2, 12/14/22 Tr. at 25:2-10; 30:20-31:13.

20 Plaintiffs’ first concern about disposition of property during enhanced cleanups is
 21 moot, because, as Plaintiffs have acknowledged (and as the Court may judicially notice),
 22 “the Zone” has been cleared. *See* Exhibit 1 at 16:24 (acknowledging that “the City has

23 ² Plaintiffs now allege injury under the Eighth Amendment’s excessive fines clause and
 24 seek monetary and injunctive relief for imposition of *any* fines on unsheltered
 25 individuals. *See* Doc. 159-1 at 42-44, 50-52. If the Supreme Court rejected the Ninth
 26 Circuit’s expansion of Eighth Amendment protections in *Grants Pass*, the City has little
 27 doubt that Plaintiff’s proposed expansion of Eighth Amendment protections against
 28 excessive fines would also fail judicial scrutiny, and the City intends to move to dismiss
 this count. In any event, as it stands, the Court’s Order says nothing about excessive
 fines, and this novel legal theory is therefore not a basis to deny dissolution of the Order.

1 cleared out the Zone”); Katherine Davis-Young, *Phoenix Clears Last Remaining Block of*
 2 *“the Zone” Encampment*, KJZZ News (Nov. 1, 2023), [https://www.kjzz.org/2023-11-](https://www.kjzz.org/2023-11-01/content-1861760-phoenix-clears-last-remaining-block-zone-encampment)
 3 [01/content-1861760-phoenix-clears-last-remaining-block-zone-encampment](https://www.kjzz.org/2023-11-01/content-1861760-phoenix-clears-last-remaining-block-zone-encampment). “The Zone”
 4 and associated enhanced cleanups are no longer. Thus, any argument or rationale for
 5 granting injunctive relief to protect personal property during enhanced cleanups
 6 disappeared along with the disappearance of “the Zone.”

7 Plaintiffs’ second concern about safeguarding personal property citywide is now
 8 remedied because the City has a citywide policy for how to handle and store personal
 9 property. Prior to the December 2022 hearing, the City submitted as evidence its “HSC
 10 [Human Services Campus] Enhanced Clean Up Abandoned Property Procedure,” which
 11 detailed the procedures that the City had adopted for retrieval, storage, and disposition of
 12 abandoned property during enhanced clean ups of the area that the Plaintiffs call “the
 13 Zone.” *See* Doc. 18-1, Attachment 1 (the “HSC Abandoned Property Procedure”). The
 14 HSC Abandoned Property Procedure applied only in the area around the Human Services
 15 Campus and did not apply citywide, nor was there a set amount of time that property had
 16 to be left before it was taken and disposed of. *See* Exhibit 2, 12/14/22 Tr. at 15:13-16,
 17 60:8-14, 61:16-22. Although the Court gave little weight to Plaintiffs’ arguments for the
 18 need for an injunction for property within “the Zone,” the Court did express concern
 19 about the lack of a policy or evidence of a consistent policy or practice for other areas in
 20 the City. *See id.* at 30:22-31:11, 32:13-19, 63:2-8. The Court’s subsequent Order made it
 21 clear that the lack of a policy explaining how property was determined to be “abandoned”
 22 and the lack of a policy that applied outside “the Zone” that provided clear notice of how
 23 long property would be stored or how it could be retrieved was of concern to the Court.
 24 *See* Doc. 34 at 10, 13-14.

25 The City took the Court’s concerns to heart. The City has since adopted formal
 26 and explicit, citywide procedures to protect personal property that is reasonably presumed
 27 to belong to unsheltered persons, *wherever in the City it may be found*. The Court has
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1 received evidence of the administrative procedures and guidance that the City
2 promulgated titled “Identification and Storage of Property Belonging to Unsheltered
3 Individuals” (the “Unattended Property Procedure”) and the “Is It Garbage?” flowchart.
4 *See* Doc. 80-1, Exhibits 1 and 2 to Declaration of Rachel Milne. These documents
5 addressed the concerns that prompted the Court to enter the Order in the first place, and
6 indeed, go beyond what is legally required to protect personal property. Specifically, the
7 City has trained its staff to distinguish between unattended property and garbage. It has
8 also formalized a policy of providing more than 24 hours’ notice before storing property,
9 leaving notice of how to retrieve property once it is removed, and providing individuals
10 up to 45 days to retrieve property prior to disposal. *See id.*

11 Together, the elimination of “the Zone” and the promulgation of citywide policies
12 to safeguard personal property comprise a significant change in facts that warrant
13 dissolution of the remaining provisions of the injunction. At the December 2022 hearing,
14 the Court stated that it did not believe that Plaintiffs had a likelihood of success on the
15 merits for a Fourth or Fourteenth Amendment violation within “the Zone.” Exhibit 2, at
16 p. 30:22-31:6. That “the Zone” has been eliminated serves only to underscore that a
17 continued injunction that covers “the Zone” is no longer warranted. Moreover, as the
18 Court stated at the March 2024 hearing, the promulgation of a policy that “was citywide
19 in terms of the seizure of property of those who were unhoused... does weigh in to
20 whether nor not there is a likelihood of violation sufficiently established in the complaint
21 as it stands now.” *See* Exhibit 1 at 15:21-23, 17:4-13. The Court’s inference was correct
22 then and remains so: the fact that the downtown area has been cleared, and the City’s
23 subsequent adoption and demonstrated adherence to a citywide policy intended to
24 safeguard property, cut seriously against Plaintiffs’ likelihood of success on the merits,
25 even if such a likelihood once existed.

26 If the Court’s own words weren’t enough, the City also notes the paucity of
27 evidence that could justify continuing the injunction. At the December 2022 hearing, the
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1 Court received evidence from a single Plaintiffs’ witness, Ronnie Massingille, who
2 testified that on December 13, 2022, he saw an alleged “sweep” in which unidentified
3 white trucks were moving and dumping material left at 9th and Jackson Streets. *See*
4 Exhibit 2, at 77:21-78:1. The City refuted this account with the testimony of Police
5 Commander Brian Freudenthal, who testified that the police presence on that date and
6 location was due to an active homicide investigation, and that the cleanup was a cleanup
7 of burnt property from a series of fires that had taken place adjacent to one of the
8 buildings. *Id.* at 83:21-84:22, 86:1-23. And notwithstanding Plaintiffs’ counsel’s
9 representations that he “could pull out declarations from people... [who] will tell you...
10 that their property is still being destroyed”—and notwithstanding the Court’s gentle
11 admonition suggesting that they file said declarations—they are yet to provide any such
12 declaration or any other evidence to this Court. *See* Exhibit 1, at 18:4-7, 19:17-20. The
13 fact that the parties have spent nearly two years in litigation without a shred of credible,
14 documented evidence from Plaintiffs of unlawful seizure or disposition of property is, if
15 not a change in facts, a compelling rationale for the Court to conclude that the injunction
16 should not continue.

17 In short, Provisions 2 and 3 of the Order should be dissolved. Plaintiffs have not
18 demonstrated a likelihood of success on the merits. As any potential claims that relate to
19 these Provisions of the Order would be for alleged unlawful disposition of personal
20 property, Plaintiffs’ claims are remediable by damages. The balance of hardships must tip
21 in the City’s favor, because on this record, Plaintiffs have failed to demonstrate any
22 likelihood of a recurring violation (to the extent they have credibly alleged a violation in
23 the first place). Finally, public policy cuts against continuing the injunction, as the proper
24 remedy for a Fourth Amendment, absent a clear pattern in the record of Fourth
25 Amendment violation is a suit for damages, rather than injunctive relief. *See City of Los*
26 *Angeles v. Lyons*, 461 U.S. at 95, 113 (1983); *INS v. Delgado*, 466 U.S. 210, 218 n.6
27 (1984) (“An ambiguous, isolated incident such as [an attempted seizure] fails to provide
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any basis on which to conclude that respondents have shown an INS policy entitling them to injunctive relief.”).

CONCLUSION

The Court can and should dissolve the Order (Doc. 34) in its entirety. The U.S. Supreme Court’s recent decision that the enforcement of generally applicable laws regulating camping on public property does not constitute “cruel and unusual punishment” prohibited by the Eighth Amendment, overturning the precedent upon which the Order rested, warrants dissolving Provision 1 of the Order. Moreover, the dismantling of “the Zone” and the adoption of consistent, citywide policies (in addition to the lack of evidence of any actual violations) constitute significantly changed facts that warrant dissolution of Provisions 2 and 3 of the Order. A proposed form of order accompanies this Motion.

RESPECTFULLY SUBMITTED this 18th day of July 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2024, I electronically transmitted the attached document to the Clerk's Office using the ECF System for filing, causing a copy to be electronically transmitted to the following ECF registrants:

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